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BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

October 21, 2004

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

VIA HAND DELIVERY

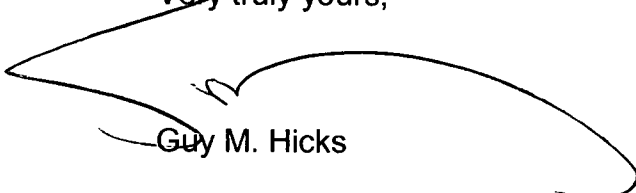
Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. against BellSouth and Request for Expedited Ruling and for Interim Relief*
Docket No 04-00306

Dear Chairman Miller:

Enclosed are the original and fourteen copies of BellSouth's *Response* in the referenced matter. Copies of the enclosed are being provided to counsel for XO.

Very truly yours,


Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of XO Tennessee, Inc. Against BellSouth and Request for Expedited Ruling and for Interim Relief*

Docket No. 04-00306

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE

BellSouth Telecommunications, Inc. ("BellSouth") submits this Response to the *Complaint* filed by XO Tennessee, Inc. ("XO") on September 21, 2004 ("*Complaint*"). For the following reasons, the Tennessee Regulatory Authority ("TRA" or "Authority") should reject XO's request for an "emergency order" for a dispute that is over two and one-half years old and find that XO's claim is not supported by the law or the parties' current Interconnection Agreement ("*Agreement*").

TRA Rule 1220-1-2-.03 allows a party thirty days to file a response to a complaint "except where otherwise provided by statute, by these rules or by order of the Authority." XO does not cite any statute or rule requiring that this matter be expedited. Moreover, there is no need for the Authority to issue an "emergency order".

XO claims that an emergency order is appropriate for this proceeding because XO is "irreparably" harmed until the Authority renders a decision on the matter. *See Complaint* at ¶¶ 14. Given the limited description of the issue by XO, the complete failure of XO to provide the history of this issue between the parties, and the scarcity of exhibits attached in support, XO has not provided sufficient

information to form the basis for emergency consideration, even if one was warranted, which is not the case. A full description of the facts reveals that an emergency order is not appropriate because (1) the instant dispute has been pending since at least February 2002; (2) XO has threatened to bring this dispute before the Authority on at least two different occasions but chose to remain silent; (3) XO has submitted three New Business Requests ("NBR") to BellSouth to order this extra-contractual service; (4) the dispute was an issue in the CLEC Collaborative in 2003; (5) the circuits of multiple parties are at issue; and (6) the docket has wide-ranging policy ramifications because XO is using this proceeding to circumvent the change of law and amendment process by attempting to "cherry-pick" certain portions of the Federal Communications Commission's ("FCC") *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*TRO*") without executing an amendment to incorporate the TRO in its entirety. Simply put, there is no "emergency" and XO is attempting through this litigation to make effective select rules from the *TRO* that XO deems desirable.

For a complete understanding of the dispute, a full description of the history between the parties is necessary – something XO conveniently failed to provide to the Authority. On or about February 18, 2002, XO submitted a NBR for BellSouth to replace approximately 2000 unchannelized DS1 loops in Florida, Georgia, and Tennessee to stand-alone UNEs.¹ BellSouth was not and is not obligated to perform such a service under the parties' *Agreement*. Moreover, BellSouth had no

¹ NBRs are requests from CLECs for BellSouth to provide a service that BellSouth is not required to provide under the Telecommunications Act of 1996 (the "Act"). Upon receiving the NBR, BellSouth determines if it can and will provide the requested service and, if so, provides the CLEC with a non-TELRIC price at which the service can be purchased

legal obligation to provide such a service at the time of the request. Consequently, XO, recognizing that the requested conversion was not contemplated under the *Agreement* and did not constitute a request pursuant to the Act, asked BellSouth, through the NBR process, to provide a price for this extra-contractual service. In response, BellSouth provided a draft agreement and asked for a meeting with XO on or about February 27, 2002.

In March 2002, BellSouth and XO met on several different occasions and the parties exchanged revisions of a Professional Services Agreement that provided for the replacement of special access circuits with stand-alone UNEs. XO also provided BellSouth with information relating to the specific circuits it was seeking to replace with UNEs to allow BellSouth to provide an estimated market-based price, which it did on May 8, 2002. After several rounds of negotiations, XO and BellSouth could not agree on a price and negotiations ended. Consequently, in May 2002, XO made its first threat to bring this matter to the Authority for resolution. See XO's May 14, 2002 email to BellSouth, attached hereto as Exhibit A (stating that "we are wasting our time and will proceed with appropriate action before the applicable authority."); see *also*, June 15, 2002 Letter from Dana Schaffer of XO to BellSouth, attached hereto as Exhibit B (stating that XO would dispute any charges other than the UNE rate for converting special access to UNEs). XO took no action regarding the parties' disputes at that time.

In early 2003, the same issue arose in the CLEC collaborative as issue "EE1: Special Access Conversion." As phrased by XO, "[t]his issue relates to BellSouth's refusal to convert special access circuits to UNEs except at exorbitant 'market

prices.’” See February 20, 2003 email from XO’s counsel to BellSouth, attached hereto as Exhibit C. XO provided the Florida Commission with the parties’ disagreement on this issue as part of the collaborative. *Id.* During this time period, the parties also discussed an extra-contractual process for the replacement of special access circuits with UNEs for both channelized and nonchannelized circuits. See February 11, 2003 email from XO to BellSouth; February 18, 2003 email from BellSouth to XO, collectively attached hereto as Exhibit D.

In April 2003, XO submitted a second NBR to BellSouth – this time seeking to replace both channelized and nonchannelized special access circuits with UNEs. BellSouth provided a response to this NBR along with a draft Professional Services Agreement on May 8, 2003. See May 8, 2003 email from BellSouth to XO, attached hereto as Exhibit E. XO provided a response to BellSouth’s NBR response on May 22, 2003 and again threatened to bring the matter to the appropriate regulatory body “if this matter is not resolved this week” See May 22, 2004 Letter from Dana Shaffer to BellSouth, attached hereto as Exhibit F.

In June 2003, BellSouth responded to XO’s May 22, 2004 Letter, wherein it (1) disagreed with XO’s allegation that the replacement process consisted of only a billing change and should be priced as such; and (2) provided a revised estimate for the services requested. See BellSouth’s June 3, 2003 Letter to Dana Shaffer, attached hereto as Exhibit G. Again, notwithstanding threats to the contrary, XO chose not to bring this matter to the Authority’s attention at that time. In October 2003, XO advised BellSouth that it no longer wished to proceed with the NBR

process. See October 16, 2004 email from BellSouth to XO, attached hereto as Exhibit H.

In December 2003, BellSouth sent XO an amendment to incorporate the FCC's TRO decision ("*TRO Amendment*"). This Amendment would have incorporated into the parties' current *Agreement* the FCC's findings in the *TRO*, including but not limited to the finding that ILECs were now obligated to convert special access circuits to stand-alone UNEs. Thus, by executing the *TRO Amendment*, XO could have obtained the contractual right (with the corresponding TELRIC pricing) for the service it previously requested through a NBR. For the obvious reason that XO did not want to incorporate all of the provisions of the *TRO* and because XO wanted to extend the life of its antiquated agreement, XO refused to engage in any substantive negotiations regarding a follow-on agreement or the *TRO*. As to the *TRO Amendment* specifically, XO rejected it and demanded that it be provided to it in a different form. With no recourse, BellSouth petitioned the Authority to force XO to renegotiate.²

In February 2004, XO sent to BellSouth its proposed *TRO Amendment*. Because the parties ultimately agreed to negotiate from BellSouth's standard, the most efficient means to address the *TRO* was to negotiate from Attachment 2 of the standard, which included the *TRO*, instead of a separate amendment. Once negotiations completed, the parties could execute a *TRO Amendment* for the

² Regarding the negotiation of the follow-on agreement, XO refused to negotiate from any agreement other than the existing agreement. Subsequent to BellSouth's filing with the Authority, the parties agreed to negotiate from the BellSouth standard for a regional agreement and asked the Authority to hold the arbitration in abeyance. Pursuant to this agreement, the parties are still engaged in negotiations.

current *Agreement*. From March to May 2004, each party exchanged a redlined *TRO Amendment*.

In July 2004, BellSouth sent XO a second amendment addressing the D.C. Circuit's decision in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*"), which vacated certain unbundling rules ("*Vacatur Amendment*"). The *Vacatur Amendment* would have incorporated the *USTA II* decision into XO's current *Agreement*, and, along with the surviving portions of the *TRO Amendment* that were not affected by *USTA II*, would have provided XO all of the relief it seeks herein – namely, a contractual obligation upon BellSouth to convert special access circuits to UNEs at TELRIC pricing. However, because XO only wants the CLEC-beneficial components of the *TRO* and does not want to bring its *Agreement* in compliance with any part of *USTA II*, XO has refused to execute either Amendment and instead has chosen to litigate.

Also in July 2004, XO submitted a third NBR to BellSouth for the extra-contractual service at issue herein. This time, XO asked BellSouth to convert 30 Global Crossing special access DS1 circuits to XO UNE DS1 circuits. See July 21, 2004 Letter from BellSouth to XO and preceding emails, collectively attached hereto as Exhibit I. Thus, in this latest request, XO requested that special access circuits be migrated from Global Crossing to XO and then converted from special access to UNEs. BellSouth provided a price to XO for this service on July 21, 2004. *Id.* The parties executed a Special Assembly Contract to convert Global Crossing special access circuits to XO special access circuits. See XO's August

13, 2004 Letter to BellSouth; BellSouth's September 8, 2004 Letter to XO, collectively attached hereto as Exhibit J. However, consistent with the position of the parties over the last two and one-half years, the parties continued to disagree as to the appropriate price XO should pay and the appropriate process to replace the special access circuits with UNEs. *Id.*

In a new argument, however, XO took the position that the TRO rules regarding conversions of special access circuits to UNEs were ***self-effectuating*** and thus an amendment was not necessary to incorporate them. *Id.* Of course, XO does not take the same position regarding *USTA II* or other aspects of the TRO that XO does not deem to be CLEC-beneficial. Finally, in late September 2004, XO filed the instant complaint – two weeks after the last correspondence between the parties.

As can be seen from this detailed history, an emergency order is not appropriate for this lingering and stale dispute, which has been ongoing for at least 30 months. Further, XO's actions during this lengthy time period belie its claim that emergency consideration is necessary to prevent ongoing harm to XO. These actions include (1) submitting three separate NBRs for the service it now claims should be provided at TELRIC; (2) making unfulfilled threats to file a complaint at the Authority for resolution of the issue during the last two and one-half years; (3) refusing to execute a *TRO Amendment* that has been outstanding since December 2003 and that would have provided XO with the relief it now seeks through litigation; and (4) waiting two weeks after the last correspondence of the parties to file the instant *Complaint*.

Contrary to XO's claims, this is not a simple case. Instead, this proceeding has wide-ranging policy ramifications as it requires the Authority to decide whether (1) CLECs can avoid their change of law obligations by using litigation to effectuate only those changes in the law that are beneficial to CLECs; and (2) CLECs can unilaterally declare that only CLEC-beneficial rules are self-effectuating to avoid the change in law process. Given the uncertainty in the industry and the plethora of change in law proceedings that will take place in the near future to address the TRO, *USTA II*, the FCC's Interim Rules (if applicable) and the yet-to-be issued Permanent Rules, these issues cannot be decided in an accelerated vacuum. Furthermore, as evidenced by XO's third NBR, the circuits of multiple parties are involved – a fact XO fails to mention to the Authority.

For all of these reasons, the Authority should deny XO's request to issue an emergency order and ultimately find that XO's claims are meritless.

Response to Specific Allegations

1. The allegations in paragraph 1 of the *Complaint* do not require a response from BellSouth.
2. BellSouth admits the allegations in paragraph 2.
3. BellSouth denies the allegations in paragraph 3 of the *Complaint*, except to admit that the Authority has jurisdiction to hear disputes over the interpretation of interconnection agreements and to hear certain types of complaints pursuant to Tennessee law.
4. BellSouth denies the allegations in paragraph 4 of the *Complaint*, except to admit that over the last two and one-half years, XO has submitted three

NBRs to BellSouth to obtain the extra-contractual service of replacing special access circuits with stand-alone UNEs.³

5. BellSouth denies the allegations in paragraph 5 of the *Complaint*. BellSouth states that its July 21, 2004 Letter (Exhibit H) speaks for itself and is the best evidence of its terms and conditions.

6. BellSouth denies the allegations in paragraph 6 of the *Complaint*.

7. BellSouth denies the allegations in paragraph 7 of the *Complaint*, except to admit that XO has submitted and BellSouth has processed three NBRs to replace special access circuits with UNEs because such a process is not available under XO's current *Agreement*. BellSouth also admits that XO could have obtained all of the relief it seeks herein by executing the *TRO Amendment*, which was made available since December 2003.

8. BellSouth denies the allegations in paragraph 8 of the *Complaint*.

9. BellSouth denies the allegations in paragraph 9 of the *Complaint*.

10. BellSouth denies the allegations in paragraph 10 of the *Complaint*. BellSouth states that the FCC's *Triennial Review Order* speaks for itself and is the best evidence of its terms and conditions.

11. BellSouth denies the allegations in paragraph 11 of the *Complaint*, except to admit that the FCC's *Triennial Review Order* speaks for itself and is the best evidence of its terms and conditions.

³ As repeatedly stated by BellSouth in the volumes of correspondence exchanged between the parties, the conversion of special access to UNEs is not a simple billing change. Further, unless and until XO executes an amendment incorporating all provisions and rules from the TRO, XO is not entitled to TELRIC pricing for the conversion of special access circuits to UNEs. As the case develops, BellSouth will supplement this position statement.

12. BellSouth denies the allegations in paragraph 12 of the *Complaint*. BellSouth states that the FCC's *Triennial Review Order* speaks for itself and is the best evidence of its terms and conditions. BellSouth also admits that XO could have obtained all of the relief it seeks herein by executing the *TRO Amendment*, which was made available since December 2003.

13. BellSouth denies the allegations in paragraph 13 of the *Complaint*.

14. BellSouth denies the allegations in paragraph 14 of the *Complaint*.

15. BellSouth denies the allegations in paragraph 15 of the *Complaint*.

16. BellSouth denies any remaining allegations not specifically denied above and states that the preliminary issues to be decided in this proceeding⁴ are (1) can XO circumvent the change of law process by attempting to make effective only the XO-beneficial aspects of the *TRO* through litigation and thus avoid those components of the *TRO* and *USTA II* that are less desirable to XO;⁵ (2) can XO unilaterally declare that only certain components of FCC rulings are self-effectuating to avoid a change in law process;⁶ (3) given the status of the law and upcoming change of law proceedings, should the Authority make these policy decisions in a vacuum in a two-party proceeding;⁷ (4) does XO's request for relief violate the parties' current *Agreement*;⁸ and (5) is XO's *Complaint* barred by laches, estoppel, or any of the other affirmative defenses plead herein.⁹

⁴ BellSouth reserves the right to add or modify the issues it believes should be decided in this case.

⁵ BellSouth's position as to this issue is NO.

⁶ BellSouth's position as to this issue is NO.

⁷ BellSouth's position as to this issue is NO.

⁸ BellSouth's position as to this issue is YES because the parties' current *Agreement* does not provide for the conversion of special access circuits to stand-alone UNEs.

⁹ BellSouth's position as to this issue is YES

17. BellSouth denies that XO is entitled to any relief requested in the WHEREFORE clause.

AFFIRMATIVE DEFENSES

1. XO's *Complaint* fails to state a claim upon which relief can be granted.
2. The Authority lacks subject matter jurisdiction to establish a rate for a non-TELRIC service.
3. XO's *Complaint* is barred by the doctrine of waiver, estoppel, and laches.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A large, stylized handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line.

By:

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
James Meza, III
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

Slaughter, Brenda

From: Shaffer, Dana [dana.shaffer@xo.com]
Sent: Tuesday, May 14, 2002 11:55 AM
To: Willis, Michael; Wright, Sue; Shaffer, Dana
Cc: Amador, David I; Vega, Len; Ruby, Shawna; Hudson, Kristen; Jaques, Deborah; Seaton, John; Salemme, Gerry
Subject: RE: BellSouth NBR for UNE Conversion Project

if the application of NRCs is not negotiable, and BellSouth refuses to provide an "all-in" quote that includes a waiver of some of all of the NRCs, then we are wasting our time and will proceed with appropriate action before the applicable authority.

-----Original Message-----

From: Willis, Michael [mailto:Michael.Willis@BellSouth.com]
Sent: Tuesday, May 14, 2002 10:22 AM
To: 'Wright, Sue'; Shaffer, Dana; Willis, Michael
Cc: Amador, David I; Vega, Len; Ruby, Shawna; Hudson, Kristen; Jaques, Deborah; Seaton, John
Subject: RE: BellSouth NBR for UNE Conversion Project
Importance: High

Sue and Dana: The price that was provided is just the price for BellSouth to project manage replacement of circuits, and the new UNE NRCs will be as set forth in the interconnection agreement.

The Price that was provided was based on the initial spreadsheet provided by XO. If it is XO's intent to move forward with the NBR BellSouth can provide another quote based on the new spreadsheet. Please confirm OX's intent.

Thanks

-----Original Message-----

From: Wright, Sue [mailto:sue.wright@xo.com]
Sent: Monday, May 13, 2002 2:02 PM
To: 'Willis, Michael'
Cc: Amador, David I; Vega, Len; Ruby, Shawna; Hudson, Kristen; Jaques, Deborah; Seaton, John; Shaffer, Dana
Subject: RE: BellSouth NBR for UNE Conversion Project

Michael - attached is the MOST current spreadsheet of circuits - There appears to be closer to 1600 circuits now.

Sue Wright
Sr. Manager - Carrier Relations
XO Communications
v: 509-434-1553
f: 509-444-5599
sue.wright@xo.com

-----Original Message-----

From: Shaffer, Dana
Sent: Monday, May 13, 2002 10:16 AM
To: 'Willis, Michael'; Wright, Sue; Shaffer, Dana
Cc: Amador, David I; Vega, Len; Ruby, Shawna; Hudson, Kristen; Jaques, Deborah; Seaton, John
Subject: RE: BellSouth NBR for UNE Conversion Project

Does Bell have any offer on an "all in" price, or is Bell's position that the NRCs will apply, as well as the project management fee?

Again -- the difference between a roughly \$56 conversion fee for loop AND transport vs. a roughly \$1500 price for conversion to a loop with no transport is impossible to justify.

-----Original Message-----

From: Willis, Michael [mailto:Michael.Willis@BellSouth.com]

Sent: Monday, May 13, 2002 12:11 PM

To: 'Wright, Sue'; Willis, Michael; Shaffer, Dana

Cc: Amador, David I; Vega, Len; Ruby, Shawna; Hudson, Kristen; Jaques, Deborah; Seaton, John

Subject: RE: BellSouth NBR for UNE Conversion Project

Importance: High

Sue and Dana:

Consistent with our May 8th meeting, attached is the written NBR firm price quote provided for BellSouth's project managed replacement of 2722 SPA circuits to UNEs in 3 states. Consistent with the Parties Interconnection Agreement, please let this serve as a firm price quote for XO's February 18th NBR. I have also attached BellSouth's response to XO's redline of the professional services agreement.

BellSouth has considered XO's counter-offer of \$112 per circuit for the project managed replacement of XO's 2722 SPA circuits, and waiver of the associated NRCs for such circuits. BellSouth is unable to accept XO's counter-offer. Therefore, consist with the Parties Interconnection Agreement XO must notify BellSouth in writing whether it accepts or rejects this offer within 30 days, or BellSouth will consider XO's February 18th NBR cancelled.

If you have any questions, please do not hesitate to call.

Thanks,

Michael Willis Bates

"The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers."

"The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers."



June 15, 2002

XO Communications

Jerry Hendrix
BellSouth Interconnection Services
675 Peachtree Street, NW
Room 34S91
Atlanta, Georgia 30375

105 Molloy Street
Nashville, TN 37201
USA

VIA FEDERAL EXPRESS

Dear Mr. Hendrix:

As you are aware, XO affiliates in TN, FL, and GA have requested that BellSouth make the appropriate billing changes to convert the circuits on the attached list to Unbundled Network Element (UNE) pricing. Although BellSouth has accepted orders for conversion of special access circuits to pricing for loop-transport combinations, BellSouth has refused to make the same billing conversion from special access to loop pricing for the circuits on the attached list.¹ BellSouth has, instead, insisted on "negotiating a market-based price" for such conversions. After many months of discussion with BellSouth, XO has recently been informed that the actual pricing is not negotiable. Moreover, BellSouth has refused to provide the circuits at cost-based, or UNE, pricing, unless XO disconnects and reconnects each circuit, incurring full non-recurring costs to do so, even though the same conversion process used for billing conversion to loop-transport combinations could be used. Actual disconnection and "reprovisioning" of each circuit is not necessary, and could result in loss of service to end users. BellSouth has offered to "project manage" the conversion, at a price of over one and a half million dollars.

In contrast, the conversion of special access circuits to loop-transport combinations is done by BellSouth, fully project-managed, as a spreadsheet billing conversion project, at a cost of roughly \$50.00 per circuit. In other words, BellSouth will convert special access circuits with mileage to loop and transport for around \$50.00, but will only convert non-mileage circuits, requiring no transport, if XO agrees to pay over \$1500.00 per circuit, and risk taking customers out of service.

BellSouth's proposal is unacceptable, and ignores BellSouth's obligation to provide access to its network at UNE rates. In fact, BellSouth's proposal appears to be nothing more than heavy-handed tactics to discourage conversion of these circuits to the appropriate pricing.

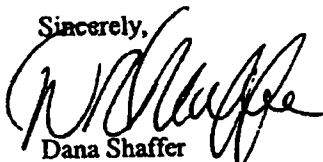
¹ The circuits on the attached list are either clearly identified in BellSouth's billing records as access, or, due to inconsistencies between the circuit identification assigned by BellSouth and the billing BAN information, appear to be billed at access rates. In any event, all of these circuits should be made available to XO at cost based, UNE rates, as set forth herein.

XO

Please be advised, therefore, that, effective July 1, 2002, XO will dispute any and all charges for the attached circuits² above the appropriate UNE rate for corresponding UNE circuits. XO is willing to pay an appropriate cost-based rate for the billing change. Since BellSouth has refused to provide such a conversion rate, XO will agree to use the billing conversion rate for access to loop-transport combinations, as set forth in the parties' interconnection agreement for each state.

XO's invocation of its right to dispute billing should not be construed as a waiver of any other right or remedy, including, without limitation, XO's right to file appropriate complaints with state and/or federal regulators. XO considers BellSouth's actions in delaying and, ultimately, refusing to make the appropriate billing conversions for these circuits to be anticompetitive, and expressly reserves the right to seek additional remedy, including, but not limited to, retroactive true-up of the amounts paid for these circuits above the applicable cost-based UNE rate.

Sincerely,



Dana Shaffer
Vice President, Regulatory Counsel

Attachment (circuit list)

Cc: CLEC Account Team, General Attorney (as set forth in the parties' interconnection agreements, via Federal Express)

² Because BellSouth has flatly refused to provide those circuits at UNE pricing, the attached list does not include circuits subtending special access transport. XO reserves the right, however, to seek review of BellSouth's policy prohibiting "commingling" of circuits, and to request appropriate retroactive re-rating of those circuits at cost-based rates to July 1, 2002.

Slaughter, Brenda

**BELLSOUTH RESPONSE
EXHIBIT C**

From: Vicki Gordon Kaufman [mailto:vkaufman@mac-law.com]
Sent: Thursday, February 20, 2003 12:49 PM
To: Greer, Stan L
Cc: Shaffer, Dana
Subject: status update for Richard

Stan: Just wanted to give you a heads up regarding the update we will give Richard re open XO issues. The note I will send to Richard shortly follows and should be reflected in your Issue Status at a Glance document and under each appropriate issue on the Tracking Tool for next week's meeting. Thanks!

On behalf of XO, I wanted to let you know where we stand on some pending issues. The following three issues should be taken up at the next meeting on Feb. 26.

EEL 1: Audit Issue – On a prior call with BellSouth, XO believed that this issue had been settled and that BellSouth had agreed that it would not seek to audit XO in Florida on EEL usage to date. While apparently BellSouth remembers the conversation differently, XO was surprised and dismayed to learn that BellSouth had reneged on this agreement. Thus, the propriety of BellSouth's audits remains open and XO will be prepared to discuss it on Feb. 26.

EE1: Special Access Conversion – This issue relates to BellSouth's refusal to convert special access circuits to UNEs except at an exorbitant "market price." BellSouth's position is, as XO understands it, that it will do a conversion involving a loop and transport for about \$50, but if the conversion is for 0 mileage circuits (that is no transport) and the loop, Bell will charge somewhere in the neighborhood of \$1500. XO understands Bell's position to be that they can charge this inflated amount because they have not been ordered to do otherwise. Bell also claimed that the price difference was attributable to the inability of Bell's systems to utilize the same process for loop conversions as that used for loop/transport conversions, based on testing of that process in which, allegedly, loop conversions had "errored out." Subsequent correspondence from Bell indicates that they, in fact, have not tested the conversion process as claimed, and, moreover, that they may charge even more than previously quoted to convert 0 mileage circuits. Thus, this issue remains open and XO will be prepared to discuss it on Feb. 26.

EEL-2: Maintenance and Repair at parity for EELs and access circuits – Stan Greer was to provide information on this at the Feb 26 meeting. XO will await Bell's discussion of this issue before deciding how to proceed.

The following issue is still under discussion between Bell and XO and need not be taken up on Feb. 26 but should be placed in monitor status for perhaps the meeting following the Feb. 26 meeting:

PO-2: Pending Facilities – XO has received complaints recently that BellSouth is rejecting EEL orders, citing lack of facilities/need for construction, but then Bell specifically accepts the order when resubmitted as Special Access for the same location. XO provided an example to Bell, but Bell was unable to track the order under the original/cancelled PON number. XO recently provided additional information, including correspondence from Bell on the example circuit, and Bell is looking into the matter further.

Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Decker Kaufman & Arnold, PA
vkaufman@mac-law.com
(850) 222-2525 Telephone
(850) 222-5606 Telefax

9/27/2004

Slaughter, Brenda**BELLSOUTH RESPONSE
EXHIBIT D**

From: Shaffer, Dana [dana.shaffer@xo.com]
Sent: Tuesday, February 11, 2003 11:33 AM
To: 'Walls, Shelley'
Cc: Case, Gary
Subject: RE: EELs Audits

I actually have worked with you enough to know that this is not a case of "faulty memory," but I appreciate your need to characterize it as such.

I am disappointed that BellSouth is backing away from the agreement reached on the call the other day, but, that said -- I must insist that BellSouth provide the specific basis for its audit demand in FL and GA -- as you know, the data provided by BellSouth, **even assuming it had any relevance** to the local use certification for the EELs at issue, indicated absolutely no basis for any concern. Thus, not only does XO disagree with BellSouth's argument regarding any correlation between overall interconnection trunk percentages and specific EEL circuits, but XO also takes issue with your statement below -- Bell's OWN DATA does not support your statement with regard to GA and FL. To continue to make such statements is misleading.

Please provide me a written statement of BellSouth's concern, with backup, for GA and FL, broken down by state. Also, please explain why BellSouth has acknowledged, on at least two occasions, that it has no basis for concern in FL and GA, according to its own data to date, but BellSouth is still not willing to drop its demand for an audit in FL and GA. XO also disagrees with BellSouth's position with regard to TN, but I thought we had agreement that, since TN is currently the subject of litigation, it should be dealt with separately. Please confirm

I am copying Stan and Vicki on our emails, because we need bring this latest development (or, rather, lack thereof) to Richard's attention in the FL collaborative. With regard to the EEL audit issue, to recap: Not only has Bell not provided any basis for its continued audit demand, the parties had reached agreement of the issue based on Bell's own data . . . but Bell is now backing away from what it apparently considered only "tentative" settlement of this issue, so the issue needs to be brought back up as unresolved in the collaborative. Shelley, I am not trying to criticize you personally or in any way mischaracterize your email below -- Stan, Vicki --let's schedule a call to discuss how to JOINTLY apprise Richard of our lack of progress on the audit issue, and fairly state the parties' positions in order to bring this up for airing in the collaborative

With regard to the remaining EEL issue, the access -to-UNE conversions: Stan -- Action items on the access-to-UNE conversion portion of the EEL issue included our getting you a number of circuits, and your getting us info/data on the test of the EEL conversion process for zero mileage circuits.

Our circuit count for a one-time conversion project is approximately 1900, region wide. I will work on getting a breakout by state.

Do you have the test information/data ready for us? Let me know.

Again, since we are back to an impasse on the audit issue, let's go ahead and let Richard know, and tee that one back up in the collaborative. I am willing, as agreed on the last call, to take one more pass at the conversion issue before we take that one back to Richard as unresolved. Please confirm Bell's willingness to attempt to reach resolution of the conversion issue -- let's not delay bringing that issue back to the collaborative if, after checking the files, BellSouth is not fully engaged in settlement discussions.

Stan, Shelley -- I look forward to hearing from each of you on these issues

-----Original Message-----

From: Walls, Shelley [mailto:Shelley.Walls@BellSouth.com]
Sent: Friday, February 07, 2003 2:29 PM
To: Dana Shaffer (E-mail)
Subject: EELs Audits

Dana,

After our discussion yesterday, I went back and looked over my files. I apologize for my faulty memory and any confusion

9/27/2004

that caused, but BellSouth is not willing to drop its audit requests in Florida and Georgia. BellSouth remains concerned that XO's EELs do not meet the local usage requirements in those states as well as in Tennessee due to continued low percentages of local and intraLATA traffic terminating to BellSouth across XO's interconnection trunks.

Shelley P. Walls

Manager - Regulatory Policy Support
BellSouth Interconnection Services
675 W. Peachtree St., NE
Atlanta, GA 30075
(404) 927-7511
Fax: (404) 529-7839

"The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers."

Slaughter, Brenda

From: Walls, Shelley

Sent: Tuesday, February 18, 2003 12:31 PM

To: 'Dana Shaffer (E-mail)'

Cc: Jordan, Parkey; Greer, Stan L

Dana,

I was disappointed by the insinuations in your letter. I didn't have my notes in front of me regarding the EEL audits as I thought the discussion was to be limited to standalone elements. Further, our discussion on February 6 did not result in, nor was it intended to result in, entering into an agreement of any sort. I merely said that I thought that we had already discussed the states in which we would conduct the EEL audits. What I was remembering was that we had agreed in September to start with the audit in Tennessee, as that is the area of the greatest concern for BellSouth. Again, I apologize for any confusion, but I was not prepared to discuss audits on that particular call.

I have given you the specific causes for BellSouth's concern regarding the audits before, and we've had meetings on the subject. I have no record or recollection of BellSouth indicating that it had no cause for concern in these two states. We simply chose Tennessee as the first state to audit because the data in Tennessee raised the most concern. As you are aware, BellSouth has had periodic and on-going concerns since July 2000 with XO's ability to accurately jurisdictionalize its traffic based on its self-reported TPIU factor compared with BellSouth's records. While that isn't directly related to the EELs in question, two of the safe harbors depend on the accurate jurisdictionalization of traffic. Further, BellSouth's records from its Agilent system indicate that XO's traffic in Georgia in December was 55% local, and in Florida it was 48% local. These percentages raise concern given that 78% of all minutes of use nationwide in 2000 were local according to the FCC's *Trends in Telephone Service* issued May 2002. This data causes BellSouth concern as to whether XO's EELs are being used to provide a significant amount of local traffic when its statewide calling patterns appear to lean more towards non-local minutes of use than the overall industry.

Your issue regarding access to UNE conversions is improperly characterized as an EEL issue. It is in no way an EEL issue - it is a business process development issue concerning an individual element. You are requesting that BellSouth develop and provide a process for XO to replace a special access local channel that BellSouth properly provisioned on XO's instructions with a UNE loop without interrupting the end user's service. BellSouth has no legal or regulatory obligations in this regard as XO was and is free to order a UNE loop if it so desires. BellSouth has offered to provide XO with the ability to accomplish its desired result. XO simply refuses to accept the rate BellSouth has offered to provide this service.

You have also inquired about tests BellSouth may have run regarding replacement of access circuits with UNE circuits. As you recall, I did not have my notes with me during our call. The tests we had run were for a different situation and were not applicable to XO's request at all. Nevertheless, BellSouth is willing to provide the process that XO has requested at market rates. I looked over the last list you had provided and many of the circuits were channelized. XO's original request was for the replacement of nonchannelized circuits, and the quote provided was based on replacement of nonchannelized circuits. To the extent that the most recent list you provided is correct, the rates previously offered will have to be adjusted, as additional work will be required for channelized circuits.

Shelley P. Walls

Manager - Regulatory Policy Support

BellSouth Interconnection Services

675 W. Peachtree St., NE

Atlanta, GA 30075

(404) 927-7511

Fax: (404) 529-7839

9/27/2004

Slaughter, Brenda

**BELLSOUTH RESPONSE
EXHIBIT E**

From: Walls, Shelley
Sent: Thursday, May 08, 2003 11:24 AM
To: 'Dean Bankes (E-mail)'
Cc: 'Dana Shaffer (E-mail)'; 'case.gary@xo.com', Robbins, Mark; Cook, Phillip
Subject: NBR Preliminary Analysis

Dean,

Please see the attached letter and proposed agreement.

Shelley P. Walls

Manager - Regulatory Policy Support
BellSouth Interconnection Services
675 W. Peachtree St., NE
Atlanta, GA 30075
(404) 927-7511
Fax (404) 529-7839

9/27/2004



BellSouth Telecommunications
Interconnection Services
675 W Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Shelley P. Walls
Manager - Regulatory and Policy Support

(404) 927-7511
Fax (404) 529-7839
e-mail shelley.walls@bellsouth.com

May 8, 2003

VIA ELECTRONIC MAIL

Mr. Dean Banks
XO Communications
105 Molloy Street
Nashville, TN 37201

RE: Special Access Local Channels to Unbundled Network Elements (UNE) Loops
(FL03-5791-00, GA03-5786-00, TN03-5776-00)

Dear Mr. Banks:

Attached is BellSouth's proposed Professional Services Agreement responding to the New Business Request (NBR) dated April 3 2003, requesting that BellSouth project manage the replacement of Special Access Local Channel circuits, which were purchased pursuant to the rates, terms and conditions in the BellSouth Access Services Tariff FCC No. 1, with UNEs. Please review this agreement and ensure that the proposal covers all of XO's needs in this matter. Before we can finalize the agreement, we need the specific circuits for Exhibit A.

Thank you for choosing BellSouth Interconnection Services as your service provider. If you have additional questions, please call me at 404-927-7511.

Sincerely,

Shelley P. Walls
Manager - Regulatory and Policy Support
Interconnection Services

cc: Phillip Cook
Mark Robbins
Dana Shaffer
Gary Case



PROFESSIONAL SERVICES AGREEMENT

THIS PROFESSIONAL SERVICES AGREEMENT is made by and between BellSouth Telecommunications, Inc. ("BellSouth"), a Georgia corporation, and XO Communications, Inc. ("XO"), a Georgia corporation, and shall be deemed effective on the date of the last signature of both Parties ("Effective Date"). This Agreement may refer to either BellSouth or XO or both as a "Party" or as "Parties."

WHEREAS, BellSouth wishes to furnish, and XO wishes to purchase project management and provisioning services in the states of Florida, Georgia, and Tennessee as set forth herein,

NOW, THEREFORE, in consideration of the mutual covenants contained herein, BellSouth and XO agree as follows:

1. TERM OF AGREEMENT

The term of this Agreement shall begin on the Effective Date and shall continue in effect thereafter for five months ("Initial Term"), unless earlier terminated as otherwise set forth herein. This Agreement shall continue in effect as specified herein unless:

- (a) Either Party terminates, with or without cause, at any time upon at least fourteen (14) days prior written notice; or,
- (b) Upon execution of a new agreement at terms to be renegotiated between the Parties; or,
- (c) Either party cancels pursuant to the terms hereof upon the other's breach.

2. SCOPE OF AGREEMENT

BellSouth will provide project management of the replacement of 1,263 non-channelized DS1 Special Access (SPA) Local Channel circuits with 1,263 non-channelized DS1 unbundled network element (UNE) Loops; 29 non-channelized DS3 SPA Local Channel circuits with 29 non-channelized DS3 UNE Loops; 341 channelized DS1 SPA Local Channel circuits and the 50 associated channelized DS3 SPA Local Channel circuits with 341 channelized DS1 UNE Loops with 50 associated channelized DS3 cross-connects (collectively, the "circuits"). The circuits to be replaced are set forth in Exhibit A. XO will not add additional circuits to this list during the term of this Agreement, and BellSouth's provision of the services set forth in this Agreement shall in no way obligate BellSouth to provide similar services to XO in the future.

3. BELLSouth DELIVERABLES

- 3.1** BellSouth will meet with XO in one or more meetings to discuss its service needs. Prior to the issuance of any LSRs / ASRs both BellSouth and XO will sign a spreadsheet acknowledging orders to be placed. BellSouth will prepare and submit, on behalf of XO, any orders required to effect the replacement of the specified circuits; provided, however, that XO shall be responsible for all appropriate ordering charges and recurring and nonrecurring charges set forth in BellSouth's tariffs and in the Interconnection Agreement between the parties.
- 3.2** BellSouth will provide the necessary resources to perform the functions set forth in this Section 3. If additional functions become necessary to effect the replacement of the circuits identified in this Agreement, the Parties will work cooperatively and in good faith to incorporate such additional functions into the process.

- 3.3 The rate conversion from special access to UNE rates for these circuits shall be effective when BellSouth's records are updated
- 3.4 BellSouth will provide a project manager to act as the single point of contact (SPOC) within BellSouth to authorize, initiate, and direct work activities covered by this Agreement. BellSouth will provide the name, telephone number, and email address of the SPOC as well as the same information for a back-up contact. The SPOC will have access to the appropriate provisioning and ordering systems to ensure compliance of the terms of this Agreement
- 3.5 BellSouth will notify XO's single point of contact (SPOC) by email of any orders in jeopardy due to clarification issues where additional information is needed from XO. In the event that a clarification requires information already provided by XO to BellSouth be corrected or reformatted, it is the responsibility of BellSouth to correct such information.
- 3.6 BellSouth will not supplement any orders, except as noted in 3.5, without direction from XO. BellSouth will not issue LSRs to correct account errors.
- 3.7 BellSouth will track the orders and coordinate meetings between the BellSouth centers involved. Coordination meetings will include, but not be limited to, identification of implementation work groups; identification of tasks, responsibilities; and critical time frames for implementation; coordination of order issuance; tracking orders through all systems for commitment due date status; identification of obstacles, strategies for overcoming obstacles; and reaffirmation of tasks and commitments with all work groups.
- 3.8 BellSouth cannot guarantee that service interruptions will not occur. XO acknowledges that service outages are possible and will indemnify, defend and hold BellSouth harmless in the event of such services outages. In the event an outage occurs, the XO SPOC will contact the BellSouth SPOC to coordinate with the BellSouth centers and BellSouth central offices identified to resolve the issues.
- 3.9 BellSouth will conduct end-to-end testing prior to turning the UNE circuits over to XO for acceptance.
- 3.10 BellSouth will develop a project plan prior to the replacement of the circuits as described in Section 2 above.
- 3.11 BellSouth will not process any orders if XO is delinquent on any of its billing accounts.
- 3.12 All work will be performed during normal business hours (8.00 a.m. to 5.00 p.m., CT) Monday through Friday, holidays excluded.

4. XO DELIVERABLES

- 4.1 XO will provide to BellSouth a spreadsheet with the complete information outlined in Section 4.2 below.
- 4.2 The spreadsheet provided by XO to the BellSouth SPOC will contain the following information
- a. LEC Name
 - b. Date
 - c. State

- d. CCNA
- e. CC
- f. SPOC Name
- g. SPOC Telephone Number
- h. SPOC Fax or E-mail
- i. ACTL
- j. CFA
- k. SWCs
- l. Existing BAN
- m. XO PON
- n. RPON
- o. Existing Circuit ID
- p. Conversion Certification Option as defined under Section 4.10

If additional information is needed to effect the replacement of the circuits identified in this Agreement, BellSouth will request and XO will provide the requested information in an expedited manner.

- 4.3 XO is responsible for providing correct account records prior to replacement. XO will be responsible for correcting inaccurate information prior to the replacement. XO's failure to provide accurate information in a timely manner may delay the replacement process.
- 4.4 XO will provide the name, telephone number and email address of a single point of contact (SPOC) as well as the same information for a back up contact. The XO single point of contact will have a period of four (4) business hours (8AM – 5PM, CT) to respond to emails regarding informational inquiries on specific accounts when problems are encountered. If the SPOC does not respond within the four (4) hour time period, BellSouth will contact the back up SPOC. The back up SPOC will have one (1) hour to respond to BellSouth. If the back up SPOC fails to respond, BellSouth will not continue work on the particular order at issue and will be released from all liability for the completion of that order
- 4.4 If the required information is not provided, BellSouth will not be held liable for orders not completed.
- 4.5 XO will serve as the interface for all end user notifications, questions or concerns.
- 4.6 XO will accept UNE circuits/lines on the dates specified by BellSouth's SPOC as long as notice of such delivery has been provided to the SPOC at least forty-eight (48) hours prior to delivery.
- 4.7 XO agrees not to perform any order activity on the circuits to be replaced after the spreadsheet is provided to BellSouth.
- 4.8 XO agrees that the circuits replaced with UNEs under the terms of this Agreement shall become subject to the rates, terms and conditions of the Interconnection Agreement between the Parties. If the FCC, Supreme Court, or other regulatory body with jurisdiction issues an effective order that affects the rate of such circuits or otherwise affects such circuits, the Parties agree to take the steps necessary to effectuate such order with regard to such circuits, including, but not limited to, amending the Interconnection Agreement and placing any additional orders required.
- 4.9 For each of the circuits to be replaced pursuant to this Agreement, XO agrees to provide certification to BellSouth, by circuit, that it meets either Option One, specified in Section 4.10 1, Option Two, specified in Section 4.10 2, or Option Three, specified in Section

4 10.3, by identifying on the spreadsheet provided pursuant to Section 4.2 for each circuit the Option under which conversion is requested.

4.10.1 Option One

4.10.1.1 A circuit may qualify under Option One if XO is the exclusive provider of all local exchange service for all of the end users served by the circuit; and

4.10.1.2 the circuit is not connected to a BellSouth tariffed service; and

4.10.1.3 one end of each circuit terminates in an XO collocation space in a BellSouth central office

4.10.2 Option Two

4.10.2.1 A circuit may qualify under Option Two if XO provides both local exchange and exchange access service to the premises of all end users served by the circuit, and

4.10.2.2 for all the end users served by the circuit, XO handles at least one third of the end user's local traffic measured as a percent of total end user customer local dialtone lines, and

4.10.2.3 at least 50 percent of the activated channels on the circuit have at least 5 percent local voice traffic individually, and

4.10.2.4 the entire circuit has at least 10 percent local voice traffic; and

4.10.2.5 the circuit is not connected to a BellSouth tariffed service; and

4.10.2.6 one end of each circuit terminates in an XO collocation space in a BellSouth central office.

4.10.3 Option Three

4.10.3.1 A circuit may qualify under Option Three if at least 50 percent of the activated channels on the circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and the entire circuit has at least 33 percent local voice traffic; and

4.10.3.2 the circuit is not connected to a BellSouth tariffed service; and

4.10.3.3 one end of each circuit terminate in an XO collocation space in a BellSouth central office.

4.11 The Parties agree that BellSouth may, at its option, conduct an audit of the circuits replaced under the terms of the Settlement Agreement following the completion of the work to determine if the UNEs meet the specified Options set forth above.

4.11.1 In the event the audit shows that any one or more of the circuits fail to meet the certification requirements set forth herein, the Parties agree to work cooperatively immediately upon the conclusion of the audit to restore to Special Access any such noncompliant circuits.

4.11.2 If any such circuits are replaced with Special Access circuits, XO agrees to pay BellSouth the difference in the UNE rate and the Special Access rate for such circuits for the period of time that they were billed as UNEs.

- 4.12 XO agrees to pay any termination liability associated with any of the circuits it requests to replace with UNEs under the terms of this Agreement.
- 4.13 No circuits subject to this Agreement and no multiplexing or other equipment associated with the circuits shall be connected to any BellSouth tariffed service.

5. PRICING AND PAYMENTS

- 5.1 Set up fees will be charged at a flat rate of \$7,500 (\$2,500 for each state), and are payable prior to commencement of any work.
- 5.2 In addition to the charge for manually submitted service orders and the recurring and nonrecurring charges for the UNEs that will replace the circuits set forth in Exhibit A, as such charges are specified in the Interconnection Agreement between the parties, XO shall pay BellSouth the following charges/rates for services provided under this Agreement:
- Order Provisioning - \$364.58 per each channel for preparing and submitting the orders necessary to effectuate the replacement on behalf of XO
 - Project Management - \$479.17 per each first channel on a DS1; \$229.17 per each additional channel on a DS1; \$562.50 per each first channel on a DS3; and \$229.17 per each additional channel on a DS3
- 5.3 BellSouth will charge \$65.00 for each line/circuit for which XO has provided incorrect information on the Excel spreadsheet. This fee also applies to lines/circuits for which other incorrect information is supplied by XO, preventing issuance of orders by BellSouth. Such charge shall cover BellSouth's cost of investigating the circuits and correcting the information.
- 5.4 In the event that XO misses an appointment scheduled during the replacement process, XO will be required to supplement its orders. In such event, BellSouth will charge XO a fee of \$50.00 per supplement, in addition to the fees shown in 5.2. In the alternative, XO may cancel the order. Although BellSouth will prepare and submit the supplemental order as described in this Agreement, XO must authorize each supplement.
- 5.5 XO will reimburse BellSouth for all pre-approved travel and lodging expenses, including meals, associated with performing the services set forth in this Agreement, and all other costs incurred by BellSouth.
- 5.6 XO shall pay BellSouth no later than 15 days after the billing date. A late payment charge of 1.5% per month will apply to any payment received by BellSouth later than 15 days after the billing date.

6. TAXES

BellSouth shall add to any invoice submitted to XO for payment an amount equal to any applicable taxes, local, state or federal, however designated, that may be validly levied or based upon this Agreement or upon the deliverables furnished hereunder. Taxes excluded and not applicable include:

- (a) Ad valorem personal property taxes;
- (b) State and local privilege and excise taxes based on gross revenue
- (c) Taxes based on or measured by XO or BellSouth net income; and
- (d) Any taxes or amounts in lieu thereof paid or payable by XO or BellSouth in respect of the foregoing excluded items

BellSouth shall bill applicable taxes as separate items on XO's invoices and shall not include them in the purchase price. BellSouth must collect all appropriate state and local sales and use taxes from XO on all sales of taxable tangible personal property and taxable services

7. TERMINATION LIABILITY

If XO terminates this Agreement prior to expiration of the Initial Term, XO shall pay to BellSouth any outstanding invoices and any invoices submitted by BellSouth for work performed prior to the termination date

8. INDEPENDENT CONTRACTOR

BellSouth shall perform all work in connection with the services described herein as an independent contractor and not as the agent or employee of XO. All persons furnished by BellSouth shall be for all purposes solely BellSouth's employees or agents and shall not be deemed to be employees of XO for any purpose whatsoever. BellSouth shall furnish, employ and have exclusive control of all persons engaged in performing services under this Agreement and shall prescribe and control the means and methods of performing such services by providing adequate and proper supervision. BellSouth shall be solely responsible for compliance with all rules, laws and regulations relating to employment of labor, hours of labor, working conditions, payment of wages, and payment of taxes such as employment, social security and other payroll taxes, including applicable contributions from such person(s) when required by law.

9. LIABILITY

- 9.1 XO Liability.** In the event that XO consists of two (2) or more separate entities as set forth in this Agreement and/or any Amendments hereto, all such entities shall be jointly and severally liable for the obligations of XO under this Agreement.
- 9.2 Liability for Acts or Omissions of Third Parties.** BellSouth shall not be liable to XO for any act or omission of another party providing services to XO.
- 9.3 Limitation of Liability**
 - 9.3.1** Except for any indemnification obligations of the Parties hereunder, each Party's liability to the other for any loss, cost, claim, injury or liability or expense, including reasonable attorneys' fees relating to or arising out of any negligent act or omission in its performance of this Agreement whether in contract or in tort, shall be limited to a credit for the actual cost of the services or functions not performed or improperly performed.
 - 9.3.2** BellSouth shall not be liable for the content or accuracy of any data provided by XO or provided under this Agreement. XO shall indemnify, hold harmless and defend BellSouth and its agents from and against any damages, losses, liabilities, demands, claims suits, judgments, costs and expenses (including, but not limited to, reasonable attorneys' fees and expenses) arising from BellSouth's performance under this Agreement related to inaccurate or incomplete data
 - 9.3.3** IN NO EVENT SHALL EITHER PARTY OR ANY OF THEIR AFFILIATES BE LIABLE FOR ANY DAMAGES WHATSOEVER, INCLUDING SPECIAL, INDIRECT, CONSEQUENTIAL, OR INCIDENTAL DAMAGES OR DAMAGES FOR LOSS OF PROFITS, REVENUE, USE OF DATA WHETHER BROUGHT IN CONTRACT OR TORT, ARISING OUT OF OR CONNECTED WITH THE SERVICES PROVIDED.
- 9.4 Indemnification for Certain Claims.** The Party providing services hereunder, its affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving company's use of the services provided under this Agreement pertaining to (1)

claims for libel, slander or invasion of privacy arising from the content of the receiving company's own communications, or (2) any claim, loss or damage claimed by the Party receiving services arising from such company's use or reliance on the providing company's services, actions, duties, or obligations arising out of this Agreement

- 9.5 Disclaimer.** EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE

10. ASSIGNMENT

This Agreement may not be assigned by either Party

11. INTELLECTUAL PROPERTY RIGHTS AND INDEMNIFICATION

- 11.1 No License.** No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. XO is strictly prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark (collectively, the "Marks") The Marks of BellSouth include those Marks owned directly by BellSouth and those Marks that BellSouth has a legal and valid license to use.
- 11.2 Ownership of Intellectual Property.** Any intellectual property that originates from or is developed by a Party shall remain the exclusive property of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.
- 11.3 Indemnification** The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service in the manner contemplated under this Agreement and will indemnify the receiving Party for any damages awarded based solely on such claims.
- 11.4 Claim of Infringement** In the event that use of any facilities or equipment (including software), becomes, or in the reasonable judgment of the Party who owns the affected facilities or equipment is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party shall promptly and at its sole expense and sole option, but subject to the limitations of liability set forth below:
- 11.4.1** modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or

- 11.4.2** obtain a license sufficient to allow such use to continue.
- 11.4.3** In the event previous sub-sections are commercially unreasonable, then said Party may, terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.
- 11.5** **Exception to Obligations.** Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor, provided the facilities or equipment (including software) would not be infringing if used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement, or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein
- 11.6** **Exclusive Remedy.** The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement

12. PROPRIETARY AND CONFIDENTIAL INFORMATION

- 12.1** **Proprietary and Confidential Information.** It may be necessary for BellSouth and XO each as the "Discloser," to provide to the other Party, as "Recipient," certain proprietary and confidential information (including trade secret information) including but not limited to technical, financial, marketing, staffing and business plans and information, strategic information, proposals, request for proposals, specifications, drawings, maps, prices, costs, costing methodologies, procedures, processes, business systems, software programs, techniques, XO account data, call detail records and like information (collectively the "Information"). All such Information conveyed in writing or other tangible form shall be clearly marked with a confidential or proprietary legend. Information conveyed orally by the Discloser to Recipient shall be designated as proprietary and confidential at the time of such oral conveyance, shall be reduced to writing by the Discloser within forty-five (45) days thereafter, and shall be clearly marked with a confidential or proprietary legend.
- 12.2** **Use and Protection of Information.** Recipient agrees to protect such Information of the Discloser provided to Recipient from whatever source from distribution, disclosure or dissemination to anyone except employees of Recipient with a need to know such Information solely in conjunction with Recipient's analysis of the Information and for no other purpose except as authorized herein or as otherwise authorized in writing by the Discloser. Recipient will not make any copies of the Information inspected by it.
- 12.3** **Exceptions.** Recipient will not have an obligation to protect any portion of the Information which:
- (a) is made publicly available by the Discloser or lawfully by a nonparty to this Agreement,
 - (b) is lawfully obtained by Recipient from any source other than Discloser;
 - (c) is previously known to Recipient without an obligation to keep it confidential;
 - or,
 - (d) is released from the terms of this Agreement by Discloser upon written notice to Recipient.

- 12.4** Recipient agrees to use the Information solely for the purposes of performing its obligations under this Agreement and for no other entity or purpose, except as may be otherwise agreed to in writing by the Parties.
- 12.5** Recipient agrees not to publish or use the Information for any advertising, sales promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.
- 12.6** **Survival of Confidentiality Obligations.** The Parties' rights and obligations under this Section shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law

13. FORCE MAJEURE

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, terrorist acts, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by XO, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

14. MODIFICATION OF AGREEMENT

- 14.1** If XO changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of XO to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.
- 14.2** No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

15. SEVERABILITY

If any provision(s) of this Agreement are invalid or unenforceable under the laws applicable to the entire Agreement, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement. Instead, the entire Agreement shall be construed as if not containing the particular invalid or unenforceable provision(s), and the rights and obligations of BellSouth and XO shall be construed and enforced accordingly.

16. WAIVERS

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

17. GOVERNING LAW

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles.

18. NOTICES

Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered by hand, by overnight courier or by US mail postage prepaid, address to:

BellSouth Telecommunications, Inc.

Laurel MacKenzie
675 W. Peachtree Street N E.
Room 34H71 BellSouth Center
Atlanta, GA 30375

XO Communications, Inc.

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

19. RULE OF CONSTRUCTION

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

20. HEADINGS OF NO FORCE OR EFFECT

The section headings used in this Agreement are for convenience only and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

21. MULTIPLE COUNTERPARTS

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document

22. COMPLIANCE WITH APPLICABLE LAW

Each Party shall comply at its own expense with Applicable Law.

23. NECESSARY APPROVALS

Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

24. GOOD FAITH PERFORMANCE

Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

25. NON-EXCLUSIVE RIGHTS

This Agreement does not grant XO an exclusive privilege to purchase services from BellSouth. BellSouth at its option may provide similar services to other entities. This Agreement does not prevent either Party from providing or purchasing services to or from any other person nor does it obligate either Party to provide or purchase any services.

26. SURVIVAL

The Parties' obligations under this Agreement, which, by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

27. ENTIRE AGREEMENT

This Agreement sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them. Any orders placed under prior agreements between the Parties shall be governed by the terms of this Agreement. Neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

IN WITNESS WHEREOF, the parties have manually or by electronic signature executed this Agreement by their duly authorized representatives in one or more counterparts, each of which shall constitute an original, on the effective date specified above.

XO Communications, Inc.

BellSouth Telecommunications, Inc.

By:

By:

(Authorized Signature)

(Date)

(Authorized Signature)

(Date)

Name:

Name:

Title:

Title:

Slaughter, Brenda

**BELLSOUTH RESPONSE
EXHIBIT F**

From: Shaffer, Dana [dana.shaffer@xo.com]
Sent: Thursday, May 22, 2003 10:28 AM
To: Walls, Shelley
Cc: Case, Gary; Miller, Elaine; Inniss, Laura D, Vega, Len
Subject: URGENT --response required

I have reviewed the NBR response you provided, and it does not comport with the request submitted.

XO, in good faith reliance on representations made by BellSouth representatives, submitted an NBR for pricing of conversion of special access circuits to UNE using the same process as that used for conversion of special access to EELs -- a BILLING ONLY change.

You simply provided the old document and pricing from last year. That documentation reflects manual disconnection and reconnection of the circuits, which is not necessary; manual order charges, although BellSouth will be creating and processing the orders internally; exorbitant project management fees; threat of service interruptions, for which Bell asserts it will not be responsible; travel and lodging expenses for BellSouth personnel, and inapplicable use restrictions and certification requirements.

This response is outrageous, and is unacceptable. The representations made by BellSouth representatives that a billing records conversion was possible, and the invitation to XO to submit the current NBR do not appear to have been made in good faith.

In the interest of fairness, I am willing to accept that this is the result of miscommunication within your own organization. Therefore, please, by COB tomorrow, May 23, 2003, either confirm that BellSouth, despite all representations, has ultimately refused and is unwilling to process these conversions as electronic billing-only changes. In the alternative, if BellSouth's representations were genuine, please respond to the NBR with process and pricing for such conversions and billing records changes.

The initial request for conversion of these circuits was submitted more than one year ago. In light of recent representations and actions by BellSouth representatives, if this matter is not resolved this week, XO will propose that this dispute be submitted to the appropriate regulatory authority for review and possible mediation, starting in Tennessee.

--
Dana Shaffer
Vice President, Regulatory Counsel
XO Communications, Inc.
615-777-7700

9/27/2004



BellSouth Telecommunications
Interconnection Services
675 W Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Shelley W Padgett
Manager - Regulatory and Policy Support

(404) 927-7511
Fax (404) 529-7839
e-mail: shelley.wails@bellsouth.com

June 3, 2003

VIA ELECTRONIC MAIL

Dana Shaffer
XO Communications
105 Molloy Street
Nashville, TN 37201

RE: Special Access Local Channels to Unbundled Network Elements (UNE) Loops
(FL03-5791-00, GA03-5786-00, TN03-5776-00)

Dear Dana

This letter is in response to your May 22 e-mail. First, I believe there was a misunderstanding regarding your discussion with the account team that led to the submission of this most recent NBR. The account team was not aware that XO had ever submitted the specific circuits that it desired to replace given that XO did not submit any specifics for two months after it initially discussed the issue with the account team and the account team was no longer involved at that point. Mr. Robbins was simply making a statement that a specific price quote for an NBR cannot be obtained without the specific circuits being considered. He did not intend to imply that the pricing for this work would change substantially from the discussions last year, only that it could be refined based on circuit-specific information.

Second, let me remind you again that we are not discussing a billing change only. XO's request to move the circuits to UNEs requires more than a billing change. Actually changing the access circuits to UNEs also requires changing the circuit inventory, maintenance, and repair systems for these circuits. In other words, these special access services must be entirely replaced with UNE circuits. Otherwise, the circuits cannot be properly billed and maintained. The proposal BellSouth made recognizes that XO does not desire to physically replace the circuits, and the offer to project manage this effort includes every effort to ensure that physical disconnection and new connection does not occur. Nevertheless, the orders required to do a physical disconnection and new connection must still be issued to ensure that the appropriate systems are changed to reflect these circuits as UNEs rather than as access services, but by closely project managing this process, we strive to avoid any actual physical disconnection that would

otherwise occur. However, the possibility of disconnection does exist. BellSouth did not "threaten" XO with disconnection; it simply wanted to ensure that XO recognized that it *could* occur, despite our best efforts.

Third, BellSouth's inclusion of manual ordering charges is reasonable. BellSouth's Professional Services personnel will be writing the orders required to effectuate this work for XO, but the orders must still be processed in the same manner as they would be if XO personnel were to write the orders. The order writing and processing are done by separate groups and a change in who writes the orders does not change the processing at all.

Fourth, BellSouth's proposal did include a provision to protect it in the event that travel and lodging expenses become necessary. BellSouth does not expect that any such expenses will be incurred.

Fifth, your e-mail states that BellSouth's proposal included "inapplicable use restrictions and certification requirements". UNEs are for the provisioning of local service and not for the bypass of access services. BellSouth will agree to provide the requested professional services, which are not required under rule or law, but desires some assurance that the UNEs will be used for their intended purpose. The use restrictions included in BellSouth's proposal, which are based on the EELs safe harbors, provide an efficient and familiar means of accomplishing this end. BellSouth is making no claim by making this offer that the EELs safe harbors apply to UNE loops, but has simply laid out the terms under which it is willing to provide the requested professional services. Obviously, XO has the option of submitting disconnect and new connect orders for these circuits (i.e., not utilizing project management from BellSouth), and the resulting UNEs would have no associated use restrictions.

Finally, in response to your May 21, 2003 e-mail regarding pricing, we have revised an estimate based on the proposal BellSouth has made and the initial quantities of circuits provided by XO. Please find it attached.

If you have additional questions or a counter-proposal, please call me at 404-927-7511.

Sincerely,

Shelley W. Padgett

Manager – Regulatory and Policy Support
Interconnection Services

cc: Phillip Cook

Attachment

Pricing and Payments	Quantity	Cost	Total
Set up Fees	3 States	\$2,500	\$7,500
Order Provisioning			
T1 Tie	1263	\$365	\$460,465
T3 Tie	29	\$365	\$10,585
Muxed DS3	50	\$365	\$18,250
Subtending DS1	340	\$365	<u>\$124,100</u>
Subtotal			\$584,565
Project Management			
T1 Tie	1263	\$479	\$605,192
T3 Tie	29	\$563	\$16,327
Muxed DS3	50	\$563	\$28,150
Subtending DS1	340	\$563	<u>\$191,420</u>
Subtotal			\$605,192
Grand Total			\$1,197,256

JAMES MEZA III
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0769

October 8, 2004

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: 041114-TP – Complaint of XO Florida, Inc. Against BellSouth
Telecommunications, Inc. for Refusal to Convert Circuits to UNEs
and for Expedited Processing**

Dear Ms. Bayó:

On October 6, 2004, BellSouth Telecommunications, Inc.'s filed its Response to XO Florida, Inc.'s Complaint. BellSouth now files this letter to correct two scrivener errors relating to dates (which are bolded below): On page 5, the last sentence of the top paragraph should read: "See **October 16, 2003** email from BellSouth to XO, attached hereto as Exhibit H." On page 6, the first sentence of the first full paragraph should read: "In July **2004**, BellSouth sent XO a second amendment addressing the D.C. Circuit's decision in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Circuit 2004) ("USTA II")", which vacated certain unbundling rules ("Vacatur Amendment")."

Also attached to this filing is Exhibit H which was inadvertently omitted from the official filing but was served upon the parties.

We ask that you file this in the captioned docket. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


James Meza III

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

**CERTIFICATE OF SERVICE
DOCKET NO. 041114-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and Federal Express this 8th day of October, 2004 to the following:

Jason Rojas
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6179
jrojas@psc.state.fl.us

Vicki Gordon Kaufman
Joseph A. McGlothlin
McWhirter Reeves McGlothlin
Davidson Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
vkaufman@mac-law.com
Represents XO

Dana Shaffer
XO Florida, Inc.
VP, Regulatory Counsel
105 Molloy Street, Ste. 300
Nashville, TN 37201
Tel. No. (615) 777-7700
Fax. No. (615) 850-0343
dana.shaffer@xo.com


James Meza III (ASIS)

Slaughter, Brenda

DOCKET 041114-TP
BELLSOUTH RESPONSE
EXHIBIT H

From: Willis, Michael
Sent: Thursday, October 16, 2003 5:02 PM
To: 'Case, Gary'
Subject: RE BellSouth NBR pricing question
Importance: High

Gary,

Consistent with the exchange of vms messages last week. I believe that you indicated that XO did not want to proceed with the NBR associated with the replacement of SPA with UNEs. Please confirm in writing XO's intentions.

Thanks,

Michael Willis Bates
Manager - Interconnection Services
675 West Peachtree N.E
34S91
Atlanta, GA 30375
404-529-7839 (fax)
404-927-8003
ipager: mwillis2@imcingular.com

-----Original Message-----

From: Case, Gary [mailto:case.gary@xo.com]
Sent: Monday, July 07, 2003 12:27 PM
To: Padgett, Shelley
Subject: RE: BellSouth NBR pricing question

Ok, thanks

Gary Case
XO Carrier Management
(703) 547-2854
case.gary@xo.com

-----Original Message-----

From: Padgett, Shelley [mailto:Shelley.Padgett@Bellsouth.com]
Sent: Monday, July 07, 2003 12:19 PM
To: Case, Gary
Cc: Shaffer, Dana
Subject: RE: BellSouth NBR pricing question

In addition to those listed charges.

-----Original Message-----

From: Case, Gary [mailto:case.gary@xo.com]
Sent: Monday, July 07, 2003 11:59 AM
To: Padgett, Shelley
Cc: Shaffer, Dana
Subject: RE: BellSouth NBR pricing question

When you say the proposal includes,

9/28/2004

It is included in the Order provisioning charge per circuit, Project Management charge per circuit or in addition to those 2 charges.

We just want to make sure we understand the proposal.

Thanks

Gary Case
XO Carrier Management
(703) 547-2854
case.gary@xo.com

-----Original Message-----

From: Padgett, Shelley [mailto:Shelley.Padgett@BellSouth.com]
Sent: Monday, July 07, 2003 11:40 AM
To: Case, Gary
Cc: Shaffer, Dana
Subject: RE: BellSouth NBR pricing question

Gary,

BellSouth's proposal includes payment by XO of the NRCs in the Interconnection Agreement for the elements used. There would be only one service order charge as there is no service order charge associated with disconnects on Access Services.

Shelley

-----Original Message-----

From: Case, Gary [mailto:case.gary@xo.com]
Sent: Monday, July 07, 2003 11:21 AM
To: shelley.padgett@bellsouth.com
Cc: Shaffer, Dana
Subject: FW: BellSouth NBR pricing question

Shelly,

Just to confirm, the NRCs in the IA for the USLXX usoc (DS 1 loop) would apply in addition to the set up, provisioning, and project management fees of the NBR? My more detailed question is embedded below.

Also for the Service Order charge, would there be 2 per circuit, an order to disco the special access circuit and an order to install the new UNE circuit?

Thanks

Gary Case
XO Carrier Management
(703) 547-2854
case.gary@xo.com

-----Original Message-----

From: Robbins, Mark [mailto:Mark.Robbins@bellsouth.com]
Sent: Monday, July 07, 2003 11:15 AM
To: Case, Gary; Robbins, Mark; Legg, Daphne
Cc: Shaffer, Dana
Subject: RE: BellSouth NBR pricing question

Gary,

It is my understanding that the IA has NRCs and SOMAN charges that would apply. Shelley Padgett (Walls) has asked that you direct any questions about the NBR to her. Her e-mail address is

9/28/2004

shelley.padgett@bellsouth.com and her phone number is 404-927-7511.

Thanks,

Mark

-----Original Message-----

From: Case, Gary [mailto:case.gary@xo.com]

Sent: Monday, July 07, 2003 8:46 AM

To: Robbins, Mark; Legg, Daphne

Cc: Shaffer, Dana

Subject: BellSouth NBR pricing question

Mark/Daphne,

In 5.2 of the NBR for the UNE conversion (pricing) it states:

In addition to the charge for manually submitted service orders and the recurring and nonrecurring charges for the UNEs that will replace the circuits set forth in Exhibit A, as such charges are specified in the Interconnection Agreement between the parties, XO shall pay BellSouth the following charges/rates for services provided under this Agreement:

Should that be read to mean that the NRCs for the UNE USOC "USLXX" @ 429.98 (4 wire DS 1 digital loop) would also apply in addition to the Order Provisioning and Project Management fees of the contract. As well as an ~ 20 per order "manual service order charge"

Thanks

Gary Case
XO Carrier Management
(703) 547-2854
case.gary@xo.com

"The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers."

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9/28/2004

Slaughter, Brenda

**BELLSOUTH RESPONSE
EXHIBIT I**

From: Kunze, Scott G
Sent: Wednesday, July 21, 2004 5:09 PM
To: 'Shaffer, Dana'
Subject: RE: XO's redline to BellSouth Professional Services Contract

Dana,

I hope everything is going well. I'm attaching my response to your following e-mail. I will also send out a hard copy tomorrow July 22nd for your records.

Sincerely,

Scott Kunze
Account Manager
BellSouth Professional Services

-----Original Message-----

From: Shaffer, Dana [mailto:dana.shaffer@xo.com]
Sent: Tuesday, July 13, 2004 3:07 PM
To: Kunze, Scott G; Karno, Michael D; Case, Gary; Buerrosse, Bob; Wright, Sue
Cc: Miller, Elaine; Kinkoph, Doug; Farmer, Dorothy
Subject: FW: XO's redline to BellSouth Professional Services Contract

Scott, I have looked over your response and it is outrageous. I am copying Dorothy Farmer, our contract negotiator at BellSouth, to put her on notice of a potential complaint action-- Dorothy, let's please discuss this asap -- as you know, conversions of special access to UNE should be done as a billing change. So XO should be able to do the conversion of GC SPA to XO SPA, then have Bell simply convert the pricing on the new XO circuit from SPA to UNE for a simple billing change charge

Because of the delay of Bell's executing (or even presenting) a proper TRO amendment, XO was, in good faith, working this request through the NBR process to have Bell manage the conversion of circuits from SPA directly to UNE, albeit at a slightly higher price. Bell presented a price for the project management of \$135 per circuit, in addition to the NRC install charges per circuit. ...NOW BellSouth claims that they will not honor that price, but will charge \$635.83 for the project management, on TOP of the NRCs

There was no misunderstanding as to what XO had requested, as the documentation will attest. This doesn't even pass the "sniff test "

In addition, we have waited weeks to get a redline back from BellSouth, only to receive this letter -- Scott, did BellSouth even engage in a good faith review of the redline, or simply delay until it could justify its reason to not honor its quoted price?

Dana Shaffer

Vice President, Regulatory Counsel

XO Communications, Inc.

615-777-7700

9/28/2004

-----Original Message-----

From: Kunze, Scott G [mailto:Scott.Kunze@BELLSOUTH.COM]

Sent: Tuesday, July 13, 2004 2:47 PM

To: Wright, Sue

Cc: Karno, Michael D; Case, Gary; Shaffer, Dana; Buerrosse, Bob

Subject: XO's redline to BellSouth Professional Services Contract

Sue,

I have attached the redlined response from BellSouth. Please don't hesitate to contact me with any questions.

Thanks,
Scott

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers. 113

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers. 113

July 21, 2004

Ms. Dana Shaffer
Vice President
XO Communications
105 Molloy Street
Suite 300
Nashville, Tennessee 37201

Dear Dana:

This is in response to your e-mail dated July 13, 2004, regarding XO Communications' (XO) request to migrate thirty (30) Global Crossing Special Access (SPA) DS1s to XO Unbundled Network Element (UNE) DS1s.

Let me first address your statement, "XO should be able to do the conversion of GC [Global Crossing] SPA to XO SPA, then have Bell simply convert the pricing on the new XO circuit from SPA to UNE for a simple billing change charge." BellSouth has neither stated that XO cannot, on its own, provide a "D" order and "N" order to move GC's SPA DS1s to XO's DS1s, nor that XO cannot provide a "D" order and an "N" order to move XO's SPA DS1s to XO's UNE DS1s. BellSouth does, however, disagree with your assessment that BellSouth simply "converts" the pricing of the XO circuit from SPA to UNE as a DS1. The purpose of my previous correspondence was to inform you that BellSouth could not sign the Professional Services agreement as it stood with a misquoted price for the services discussed. I provided to you that notice and the additional pricing for Professional Services to coordinate both the GC SPA DS1 to XO SPA DS1 and the XO SPA DS1 to XO UNE DS1.

As you are well aware from previous requests to migrate XO's single Special Access (SPA) circuits to UNEs, the process to fulfill XO's request is not "simply" a billing change. To refresh your recollection, I have attached documentation exchanged between BellSouth and XO since as early as May 13, 2002, regarding XO's previous requests to migrate individual SPA circuits to UNE circuits. This process, as previously described to you, entails provisioning the special access disconnect ("D") in the Access Customer Advocacy Center (ACAC), while the provisioning of the unbundled loop new connect/add order is performed by the Customer Wholesale Interconnection Network Services (CWINS). For this process, Professional Services can coordinate these orders so that the "D" order is not physically worked. Moreover, the "N" order flows through the systems so that XO can reuse the facility. Because these two classes of service are maintained in two separate systems, and provisioning and maintenance is conducted by two different centers, the steps to migrate from SPA to UNE cannot be achieved with a "simple billing change" as you indicate in your letter. BellSouth Professional Services can coordinate this process in addition to the process of coordinating the "N" and "D" orders related to moving Global Crossing's SPA DS1s to XO's network.

As BellSouth understands it, XO is requesting an after normal business hours migration of thirty (30) of Global Crossing's SPA DS1s to XO as UNEs. As explained in my July 13, 2004 letter, the executed Special Assembly was to achieve the after hours migration of Global Crossing's SPA DS1s to XO SPA DS1s. The price quoted in the Professional Services Agreement currently being negotiated, is solely to project manage the migration of XO's 30 new SPA DS1s to UNE DS1s. As detailed in my previous letter, there was an error in

the price quoted to perform the work necessary to achieve migration of XO's SPA DS1s to UNE DS1s. It took BellSouth four weeks to respond to XO's redline because due diligence was needed to address XO's changes and review all of the appropriate documentation germane to XO's request as it was an unusual request where it is not a like-for-like migration from one CLEC to another CLEC (i.e., SPA to SPA). The process for this is to migrate the SPA circuits to the second CLEC's SPA arrangement and then move from SPA to UNE. At this time, this can only be done through "N" and "D" orders as your Interconnection Agreement does not allow for a conversion from SPA to UNE; however, you can coordinate the "N" and "D" orders with a Professional Services agreement.

I would like to point out that Professional Services offers this service in lieu of XO having to expend its own resources to conduct the migration of services. Such migrations of services can be handled through XO's issuance and coordination of its own disconnects and new connect orders, without BellSouth's facilitation;

BellSouth has now provided quotes to XO to project coordinate both the SPA-to-SPA and the SPA-to-UNE migrations. Please respond within seven (7) calendar days to accept or reject BellSouth's current price quote as follows:

1. GC SPA to SPA -- \$135.00 per circuit
2. XO SPA to UNE -- \$347.48 per circuit
3. XO SPA to UNE with order provisioning -- \$635.83 per circuit

Consistent with your comments concerning updating XO's Interconnection Agreement, I have discussed this with your contract negotiator, Dorothy Farmer. It is my understanding that an amendment to your existing interconnection agreements to incorporate the Federal Communications Commission's (FCC) Triennial Review Order (TRO)¹ was sent by BellSouth to XO on December 9, 2003. Subsequent to sending these amendments, on February 18, 2004, BellSouth and XO agreed to negotiate a regional Interconnection Agreement to replace XO's existing Interconnection Agreements. As a part of the agreement reached on February 18, 2004, the parties agreed to negotiate Attachment 2 -- Unbundled Network Elements ("UNEs") - first so that the agreed-upon TRO provisions could be used to amend the parties' existing Interconnection Agreements. BellSouth stands ready to amend the parties' Interconnection Agreements to be compliant with existing laws and orders (including the TRO and the D.C. Circuit Court's vacatur Order²).

Please feel free to call me, if there are additional questions.

Sincerely,

Scott Kunze
BellSouth Account Manager
Interconnection Sales

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO").

² *UNITED STATES TELECOM ASSOCIATION v. FEDERAL COMMUNICATIONS COMMISSION and United States of America* (359 F.3d 554) March 2, 2004 ("DC Circuit Court Order")

August 13, 2004

Scott Kunze
BellSouth Account Manager
Interconnection Sales
Via email

Dear Scott.

I have reviewed your letter of July 21, 2004; your response is unacceptable. Contrary to your assertions, the conversion of the special access circuits of XO affiliates¹ to unbundled network element (UNE) pricing should be primarily a billing change only, with no physical change to the circuits.

In your letter, you take two single spaced pages attempting to avoid one simple fact: BellSouth should not, and, indeed, cannot charge for physical disconnect and new installation orders for the billing conversion of special access to UNE, nor should XO be required to pay additional project management fees to BellSouth for processing those "phantom" orders. Amazingly, your proposal that, for an additional project management fee, BellSouth could "coordinate these orders so that the "D" [disconnect] order is not physically worked" clearly indicates that the physical disconnection and re-installation of the circuit are not required.

The FCC has made clear that the special access to UNE conversion is largely a billing function for which conversion fees are inappropriate, and that such billing changes should be processed within one billing cycle of the request. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO"), par. 586 - 589.

BellSouth attributed its delay in complying with the TRO's requirements to the absence of a TRO amendment. BellSouth is wrong². The TRO was clear: the TRO's rules

¹ "XO" refers to all XO state affiliates doing business with BellSouth, including the newly acquired Allegiance entities.

² Moreover, BellSouth has not, contrary to the assertions in your letter, presented XO with an amendment that is TRO compliant; quite the contrary. If BellSouth truly "stands ready to amend the parties' Interconnection Agreements to be compliant with existing laws and orders," as you claim, then start with complying with the TRO's conversion requirements.

regarding special access to UNE conversions are self-effectuating. In fact, the TRO clearly required that, to the extent pending requests at the time of the TRO were not converted, XO is entitled to the appropriate pricing as of the date of the order. Your letter is a clear admission that BellSouth has refused to comply with the TRO's conversion requirements.

With regard to the Global Crossing conversion project, XO understands that BellSouth's price for project management of the physical conversion of Global Crossing special access circuits to XO special access circuits is \$135.00 per circuit. XO reserves the right to review the charges applicable to the special access conversion from one carrier to the other.³ XO strenuously objects, however, to your attempt to characterize the conversion of the resulting XO special access circuits to UNE pricing as being in any way related to that project. The conversion of XO special access circuits to UNE pricing should not be subject to any "new business" request requirements; such conversion is required by the FCC rules to ensure access to the UNE pricing set forth in the parties' interconnection agreements.

If, in order to complete this project, XO is forced to process "D" and "N" orders to effectuate this billing conversion or to pay BellSouth additional fees to manage those orders to ensure its customers' services are not affected, XO will do so under protest, and will dispute any charges associated with those orders that exceeds a just and reasonable billing change charge. Moreover, XO reserves its right to bring appropriate action against BellSouth for its refusal to provide access to these conversions in a manner compliant with state and federal law as well the parties' interconnection agreements,⁴ and will seek all appropriate relief, including retroactive billing adjustments and punitive damages for anticompetitive conduct. To that end, please accept this letter as official notice of dispute under the terms of the notice section of the parties' interconnection agreements.⁵

³ As you know, the conversion in this instance does not require all of the work processes normally associated with a new install, which is the basis for XO's original request that the conversion from Global Crossing directly to XO UNE be given a reduced price. BellSouth originally agreed, then withdrew its offer. In reserving its right to seek resolution of this dispute, as set forth below, XO also reserves the right to request that the reviewing commission require BellSouth to provide the originally requested conversion at a cost-based rate.

⁴ See "Resolution of Disputes," XO TN ICA General Terms and Conditions, Part A, section 10, GA and FL, section 12, Allegiance GA section 11, FL section 16.

⁵ See e.g. "Notices", XO TN ICA General Terms and Conditions, Part A, section 19, GA and FL, section 22; Allegiance GA section 19, FL ICA adoption papers section 11.

Please advise immediately whether BellSouth will provide these billing conversions, and at what rate. Also, please indicate whether BellSouth would consider honoring its original agreement to provide the conversions from Global Crossing special access directly to XO UNE circuits. Finally, please advise whether you are the appropriate contact now for discussions regarding past/pending special access to UNE conversion requests and billing adjustments owed to XO by BellSouth; if not, please give me the appropriate current contact.

Sincerely,

Dana Shaffer
Vice President, Regulatory Counsel

Cc: Jerry Hendrix, BellSouth, via email
BellSouth CLEC Account Team/Local Contract Manager, via certified mail
BellSouth ICS Attorney/General Attorney – COU, via certified mail
Dorothy Farmer, BellSouth, via email
Gegi Leeger, XO, via email
Alaine Miller, XO, via email
Doug Kinkoph, XO, via email



BellSouth Interconnection Services

675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Michael Willis
(404) 927-8003
(404) 529-7839

September 8, 2004

Ms. Dana Shaffer
Vice President
XO Communications
105 Molloy Street
Suite 300
Nashville, Tennessee 37201

Dear Dana:

This is in response to your letter dated August 13, 2004, regarding XO Communications' (XO) request to migrate thirty (30) Global Crossing Special Access (SPA) DS1s to XO Unbundled Network Element (UNE) DS1s.

As was stated in our July 21, 2004 letter, BellSouth stands ready to amend the parties' Interconnection Agreements to be compliant with existing laws and orders including the Federal Communications Commission's (FCC) Triennial Review Order (TRO)¹, the D.C. Circuit Court's vacatur Order² and, should it become effective, the FCC's interim rules released August 20, 2004. BellSouth sent to XO a modified Attachment 2 on December 9, 2003, which incorporated provisions of the FCC's TRO.

Contrary to XO's assertions, the TRO does not set forth any provisions that would be self-effectuating. As support for its position, XO cites paragraph 589 that states: "The eligibility criteria we adopt in this Order supercede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this order." Clearly the FCC is only addressing pending conversion orders for Enhanced Extended Links (EELs) submitted consistent with the safe harbors that were replaced by the eligibility criteria of the TRO. Thus, consistent with the terms of the Interconnection Agreement and with XO's and BellSouth's past practice of implementing Orders and changes in law, an amendment to the parties' Interconnection Agreement is required. If XO believes that changes in law are self-effectuating, then clearly XO would not be entitled to any UNE transport as XO has requested, because the DC Circuit Court of Appeals found the FCC's impairment test regarding transport and certain other UNEs to be illegal.

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO").

² *UNITED STATES TELECOM ASSOCIATION v. FEDERAL COMMUNICATIONS COMMISSION* and *United States of America* (359 F.3d 554) March 2, 2004 ("DC Circuit Court Order")

While the TRO requires the Incumbent Local Exchange Carrier (ILEC) to permit the "conversion of wholesale services to UNEs and UNE combinations so long as the competitive LEC meets the eligibility criteria that may be applicable"³, the process to do so is far from a "simple" billing change. The FCC refers to these conversions in the TRO as "largely a billing function" to ensure that any pricing changes occur within the next billing cycle after the completion of the conversion, rather than dictating what the process will be to accomplish such conversions.

Consistent with the Special Assembly Contract executed on June 17, 2004, BellSouth will migrate the Global Crossing SPA DS1s to XO's SPA DS1s after normal business hours for \$135 per circuit. However, BellSouth disagrees with XO that it has any requirement under the parties' current Interconnection Agreement to convert XO's SPA services to UNEs without XO's submission of a New Business Request (NBR). As stressed in my July 21, 2004 letter, we have discussed this type of request with XO over the past three years and BellSouth has always required a NBR to accomplish replacing SPA services with UNEs, as the parties' current agreement only contains provisions to convert SPA circuits to EELs.

Again, let me point out that Professional Services offers this service in lieu of XO having to expend its own resources to conduct the replacement of services. XO may submit disconnect (D) and new (N) connect orders without BellSouth's facilitation. Consistent with the parties' current Interconnection Agreement, if spreadsheets with single element SPA circuits are submitted to your BellSouth account team to be replaced with single element UNE, they will not be replaced without XO going through the NBR process and negotiating a Professional Services Agreement.

It is BellSouth's hope that the parties will come to agreement on the appropriate amendment to the parties' Interconnection Agreement to bring it compliant with current law. We are also hopeful that the parties will be able to resolve XO's outstanding request to convert the Global Crossing SPA circuits to XO UNEs.

Please feel free to call me if there are additional questions.

Sincerely,

Michael Willis
Manager - Interconnection Marketing

³ TRO, Para 588.

CERTIFICATE OF SERVICE

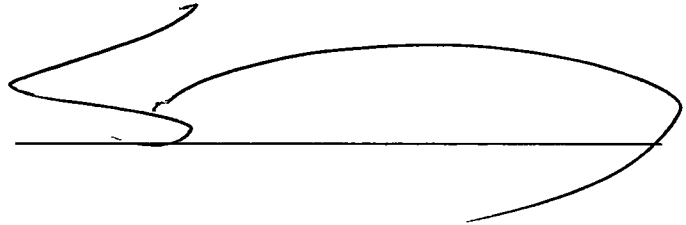
I hereby certify that on October 21, 2004, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight
- ☐ Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Street, #1600
Nashville, TN 37219-8062
hwalker@boultcummings.com

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight
- ☐ Electronic

Dana Shaffer, Esquire
XO Communications, Inc.
105 Malloy Street, #100
Nashville, TN 37201
dshaffer@xo.com

A handwritten signature in black ink, appearing to read 'Dana Shaffer', written over a horizontal line.